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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY CLARK STEPHENS,

Defendant and Appellant.

G056299

(Super. Ct. No. 15NF1464)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Scott A. Steiner and John Conley, Judges. Affirmed.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

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Larry Stephens appeals from a life sentence for first degree murder (Penal Code, § 187). He contends the trial court prejudicially erred in excluding certain evidence and denying his motion to disclose a confidential informant. For the reasons stated below, we affirm the judgment.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Stephens and Paul W. attended high school together and were friends. In 1973 and 1974, Stephens often visited Paul, who was living in the City of La Palma, and stayed at Paul's apartment for weeks at a time. He last visited Paul two to three weeks before the murder of Annie R., who lived in an apartment below Paul's.

Annie often left her front door unlocked and her sliding glass door open. Annie's friends included another resident, Rodney W., and Rodney's girlfriend, Sharon R. Annie also was in a sexual relationship with another resident, Robert J.

On December 11, 1974, Annie, Sharon, Robert, and Rodney planned to meet for dinner at a Seal Beach residence the two men recently rented. The residence was located 15 to 20 minutes away from their apartments. Robert last saw Annie alive that morning. Around 5:30 p.m., Sharon arrived at the Seal Beach residence and found Robert and Rodney already present. Robert told Sharon he had called Annie's workplace and was told that Annie had left at 5:00 p.m. Annie's workplace was in the same strip mall as a pizza place, and was "almost around the corner" from the apartment complex. Sharon believed Annie would go home to feed her small dog before driving to Seal Beach with pizzas for their dinner.<sup>1</sup>

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<sup>1</sup> At around 5:30 p.m. that day, a neighbor heard Annie's dog barking in a muffled tone from one of the back rooms of Annie's apartment. By the time the neighbor left the complex at around 5:50 p.m., she no longer heard any barking. Investigators found Annie's dog alive in the bedroom inside a dresser drawer.

At around 5:45 p.m. or 6:30 p.m., Sharon grew concerned that Annie, who was usually punctual, had not arrived. Sharon began calling Annie's apartment every 15 minutes, but received no answer. Sharon also called the pizza place and found out Annie had not been there. Sharon told Rodney they should drive to Annie's apartment to check on her. Around 7:45 p.m., Sharon gave Rodney a key to Annie's apartment and Rodney left to check on Annie. Meanwhile, at around 5:45 p.m., Robert left for a prescheduled basketball game nearby, and he returned around 8:10 p.m. When he returned, he had a bloody cut on his head and blood on his T-shirt after being hit by another player's elbow.<sup>2</sup>

When Rodney arrived at Annie's apartment, he found her car parked in her assigned space and her apartment completely dark. He knocked on the door and called out Annie's name, but received no response. Rodney unlocked the door and entered her dark apartment. He turned on the lights and eventually found Annie, face down and covered in sheets on her bed. She was naked and her back was bruised and discolored. Rodney, a state police officer, used the kitchen phone to call his sergeant and the La Palma Police Department. He also called Robert and Sharon to tell them that Annie had been murdered.

Annie's apartment was in disarray, as if a struggle had taken place. A fresh blood smear was found on the windowsill of the bedroom window, an inch away from the window's lock. Later that night criminalists collected, among other things, the bloodstain on the bedroom windowsill and all the bedding, including the comforter. Annie's autopsy was performed by a now deceased doctor on December 12, 1974. At the autopsy, criminalists collected fingernail scrapings and cuttings, and vaginal and anal swabs.

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<sup>2</sup> Randolph W. testified he played in the basketball game with Robert. He confirmed Robert suffered an injury to his head when hit by an opposing player. He also testified Robert left around 7:50 p.m.

Dr. Anthony Juguilon, a forensic pathologist, testified Annie died of asphyxia (lack of oxygen) as a result of being manually strangled by two hands. He based his opinion primarily on the autopsy photographs, explaining “when there is a sustained lack of oxygen to the brain, it is widely accepted in the forensic world[ ] that within five minutes, a person typically will succumb to asphyxia.” He believed that Annie’s death likely took several minutes. On cross-examination, Juguilon testified that in manual strangulation, depending on factors such as lung capacity, a victim can succumb to asphyxia within 30 seconds, but he did not believe that occurred in this case because Annie was not old or frail.

Juguilon also testified Annie suffered trauma to her mouth, but that did not contribute to her death. Her anus had some lacerations, tearing and bruising, with fresh blood surrounding those injuries. The injuries were caused by inserting something into her anus before she died, but it could not be determined what was inserted. The injuries did not contribute to Annie’s death.

The murder remained unsolved for many years. The investigation was hampered by the lack of DNA testing, which did not exist at the time of the murder. After DNA testing became available, the collected samples were tested, and established that a single male was the source of the blood on the windowsill and a major contributor to the blood found on the comforter. That DNA profile was submitted to the Combined DNA Index System (CODIS) database. Robert, Rodney, and 15 other males were excluded as the source of the blood. No semen was found in the anal and vaginal swabs or on the comforter. Semen found on the bed sheets was matched to Robert.

In March 2015, Stephens was arrested for domestic violence against his former wife, and his DNA was collected and entered into the CODIS database. Stephens’s DNA profile matched the DNA profile from the blood on the windowsill and on the comforter. Stephens also was not excluded as the major contributor to the DNA found in Annie’s left and right fingernail clippings.

In May 2015, James Engen, a captain with the La Palma Police Department, was informed of the match to Stephens's DNA. On June 1, 2015, Engen and a detective contacted Stephens at a mobile home park in Santa Rosa, California. When the officers asked Stephens about the apartment complex where Annie was murdered, Stephens stated the only place he had ever been at the complex was his high school friend's apartment. When the officers showed Stephens a photograph of Annie, he claimed he had never met her. The officers arrested Stephens and took him to the Santa Rosa Police Department for a recorded interview.

During the interview, Stephens asserted he had "never run across that girl [Annie] in my life." When the officers asked if Stephens could explain why there was evidence he had been inside Annie's apartment, he answered, "No, that is totally unexplainable." Stephens reiterated that "the only apartments I was ever in at that apartment complex, were the two [apartments his high school friend had] lived in." Stephens ended the interview when the officers told him they believed he murdered Annie.

Deputy Sheriff Kevin Reinhardt testified he booked Stephens into jail on August 1, 2015. During the booking process he questioned Stephens to determine if Stephens harbored animosity towards jail officers because he had been charged with obstructing a police officer. Reinhardt asked Stephens about the charge, and Stephens responded, "I wanted them to kill me." Asked about the delay between his arrest and booking, Stephens responded, "If someone did this in the past, don't you think they would always have it in the back of their mind that they could get caught?"

Later, while Stephens was in jail, he wrote several letters to his wife, who later gave them to law enforcement. In those letters, Stephens wrote that, "If I had known that DNA swab was going to result in a cold hit, (How? I don't know), I'm sure I would have taken my life." He also wrote that he had "a deep seated case of misogyny (hatred of women)."

A jury found Stephens guilty of first degree murder. The trial court sentenced him to life in prison with the possibility of parole.

## II

### DISCUSSION

#### *A. The Trial Court Did Not Err in Excluding Evidence the Victim Owned a Vibrator*

Stephens contends the trial court prejudicially erred in excluding evidence Annie owned a vibrator. We disagree.

##### 1. Relevant Facts

Initially, the prosecutor asserted two theories of first degree murder: felony murder (rape/sodomy) (Pen. Code, § 189), and premeditated murder (Pen. Code, § 187). (See *People v. Chun* (2009) 45 Cal.4th 1172, 1182 [“First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery.”].) Before trial, defense counsel sought to exclude evidence Annie had been sodomized. During arguments, defense counsel mentioned investigators found a vibrator in Annie’s apartment. The prosecutor argued the vibrator was irrelevant because there was no evidence a vibrator had been used to inflict the injuries to Annie’s anus. The trial court weighed the evidence under Evidence Code section 352, and denied the motion to exclude evidence of sodomy.

Later at the same hearing, the prosecutor moved to exclude evidence of the vibrator as irrelevant. Defense counsel argued that because evidence of sodomy was being admitted, evidence of the vibrator was relevant because it could have been the unknown object used to injure Annie’s anus. After the trial court learned the vibrator was not bloody, had no male DNA, and was located in a hallway cupboard outside the bedroom, it granted the prosecutor’s motion to exclude evidence of the vibrator.

During trial, Sharon testified on direct examination that Annie had confided she did not like anal sex. Defense counsel sought permission to cross-examine Sharon

about the vibrator, arguing it was relevant in light of Sharon’s testimony. The trial court denied the motion.

The prosecution withdrew its felony murder theory. (See *People v. Hughes* (2002) 27 Cal.4th 287, 368 (*Hughes*) [“felony-murder charge as to sodomy was erroneous because at the time the crimes were committed [before 1990], sodomy was not listed in the statute as a predicate felony for first degree felony murder”].) During closing arguments, the prosecutor referenced the fact Annie had been sodomized several times, and argued that Stephens either “decided before he entered to kill her afterwards or he decided after he violated her and all the noise she and her dog made that he needed to kill the witness.”

## 2. Analysis

Stephens contends we must reverse his first degree murder conviction, or reduce it to second degree murder, because the trial court excluded evidence the victim possessed a vibrator. He argues the trial court’s evidentiary rulings violated his federal constitutional rights to due process, a fair trial, confrontation and cross-examination, and a meaningful opportunity to conduct a complete defense. We disagree.

Stephens has forfeited most, if not all, of his claims because he failed to object to the trial court’s rulings on those specific grounds. (See, e.g., *People v. Riccardi* (2012) 54 Cal.4th 758, 801 [“defendant has forfeited his contentions of federal constitutional error by failing to assert them before the trial court”], abrogated in part by *People v. Rangel* (2016) 62 Cal.4th 1192, 1215-1216 [“in a case tried before [*Crawford v. Washington* (2004) 541 U.S. 36] a defendant does not forfeit a *Crawford* challenge by failing to raise a confrontation clause objection at trial”].)<sup>3</sup>

In any event, any error was harmless. The vibrator evidence had very little, if any, probative value. As noted, the vibrator was not found in the bedroom where

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<sup>3</sup> Stephens’s case was tried in 2018.

Annie was killed, and it was devoid of any male DNA. The anal injuries did not contribute to Annie's death. Consequently, the exclusion of the vibrator evidence is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 999 (*Cunningham*) ["exclusion of defense evidence on a minor or subsidiary point" reviewed for error under *Watson*].) Here, even had the vibrator evidence been admitted, there is no reasonable probability Stephens would have obtained a more favorable result. The DNA evidence established that Stephens's blood was present on the windowsill and the comforter. No evidence showed an innocent reason for the presence of Stephens' DNA. Stephens denied being acquainted with Annie. He also admitted he was a misogynist, and acknowledged he was familiar with Annie's apartment complex. Stephens's letters to his wife showed a consciousness of guilt by admitting he would have committed suicide had he known investigators would find his DNA in Annie's bedroom. Finally, the evidence showed it was practically impossible for Robert – who Stephens argued might have used the vibrator on Annie – to be the murderer. Based on testimony about her work schedule and a neighbor's testimony about the barking of her dog that day, Annie was killed around 5:30 p.m. Sharon, however, testified Robert had left to play a basketball game around that time, and a fellow player confirmed Robert's presence at the game. On this record, it is not reasonably probable the jury would have found Stephens was not the murderer.

Nor does the exclusion of the vibrator evidence require a reversal of Stephens's first degree murder conviction. (See *Hughes, supra*, 27 Cal.4th at p. 368 [reversal of the first degree murder conviction not required where the jury's verdict reflects it was grounded upon a valid alternate theory].) Here, Juguilon opined the murderer manually strangled Annie for several minutes. In closing arguments, the prosecutor repeatedly argued that the manner of killing evidenced premeditation and deliberation. It is well-established that evidence of manual strangulation alone supports an inference of premeditation and deliberation. "This prolonged manner of taking a



person's life, which requires an offender to apply constant force to the neck of the victim, affords ample time for the offender to consider the nature of his deadly act.” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1020 (*Hovarter*).) “Thus, where strangulation occurs over a prolonged period of time, a rational juror could find that the killer committed a premeditated and deliberate murder.” (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 11 [expert testimony indicated manual strangulation of victim “could have taken anywhere from one to five minutes”]; accord, *Hovarter, supra*, at pp. 1019-1020 [sufficient evidence of premeditation and deliberation where defendant strangled victim for between five and eight minutes]; *People v. Stitely* (2005) 35 Cal.4th 514, 544 [pathologist's testimony that lethal pressure had been applied to victim's neck for a “long” time supported finding of premeditation]; *People v. Davis* (1995) 10 Cal.4th 463, 510 [strangulation of sexual assault victim for up to five minutes suggested deliberate plan to kill her]; see also *People v. Bonillas* (1989) 48 Cal.3d 757, 792 [ligature strangulation is inherently deliberate act].) In sum, any error in excluding the vibrator evidence was harmless.

*B. The Trial Court Did Not Err in Denying Defense Motions to Disclose a Confidential Informant*

Stephens contends the trial court erred in denying two defense motions to disclose a confidential informant (CI). We disagree.

1. Relevant Facts

Before trial, Stephens filed a motion seeking the disclosure of a CI. The CI had told the lead detective his female friend admitted to the CI she and Annie were friends and they both sold large quantities of hashish, and she had expressed fear that Annie's murder was due to their drug dealing. Stephens acknowledged the CI was not a percipient witness, but argued the CI could give evidence that might exonerate him.

The trial court (Judge Scott Steiner) denied the motion to disclose the CI. The court stated that the CI's friend's statements about extensive drug dealing were not

corroborated by evidence found in Annie's apartment. It concluded the defense failed to make its "low prima facie showing" there was a reasonable probability the disclosure of the CI could provide exculpatory evidence. Consequently, the court declined to hear the testimony of the lead detective and the CI's friend in an in camera hearing.

Stephens later renewed the motion for disclosure of the CI based on statements Sharon had made that Annie was having money problems and Sharon's discovery after Annie's death that large amounts of money were deposited in Annie's bank account. On the eve of trial, the trial court found the defense failed to make it prima facie case for disclosure. The court also denied defense counsel's request to send the matter back to Judge Steiner for reconsideration.

## 2. Analysis

In a motion to disclose a confidential informant's identity on the ground the informant is "a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure." (Evid. Code, § 1042, subd. (d); all further statutory citations are to the Evidence Code.) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant." (*People v. Lawley* (2002) 27 Cal.4th 102, 159.) The defendant bears the burden of proof. (*Ibid.*) "[W]hen the informer is shown to have been neither a participant in nor a nonparticipant eyewitness to the charged offense, the possibility he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility." (*People v. Lee* (1985) 164 Cal.App.3d 830, 836 (*Lee*).) "During the hearing, if the privilege provided for in [Evidence Code section] 1041 is claimed . . . , the prosecuting attorney may request the court to hold an in camera hearing . . . outside the presence of the defendant and his counsel." (§ 1042, subd. (d); *People v. Ruiz* (1992) 9 Cal.App.4th 1485, 1488.) "It is incumbent on the

defendant to make a prima facie showing for disclosure before an in camera hearing is appropriate.” (*People v. Oppel* (1990) 222 Cal.App.3d 1146, 1152 (*Oppel*).)

We review a trial court’s ruling concerning the disclosure of the informant’s identity for an abuse of discretion. (*Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277.) A trial court does not abuse its discretion in denying the motion to disclose where “the record demonstrates, based on a sufficiently searching inquiry, that the informant could not have provided any evidence that, to a reasonable possibility, might have exonerated defendant.” (*People v. Bradley* (2017) 7 Cal.App.5th 607, 620.)

Stephens contends the trial court erred in declining to hold a “hearing,” whether in open court or in camera, under section 1042, subdivision (d). Under section 1042, subdivision (d), when a criminal defendant demands disclosure of a CI who is “a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure.”

Here, contrary to Stephens’s claim, the trial court held a hearing on the motion and, based on the written motion and arguments, concluded that Stephens failed to meet his burden to show a prima facie case for disclosure. The record supports the court’s conclusion. Defense counsel acknowledged that the CI was not a percipient witness. Thus, “the possibility [the CI] could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility.” (*Lee, supra*, 164 Cal.App.3d at p. 836.) Moreover, because the CI was not involved in the purported drug dealing, the possibility the CI could identify drug customers or rival drug dealers with a motive to kill Annie is remote. Additionally, Annie’s possible drug dealing could not provide an exculpatory reason for the presence of Stephens’s DNA in Annie’s bedroom. No evidence was presented that Stephens was a drug customer, and even if he was, that fact did not preclude him from being the murderer. Indeed, it could

establish an additional motive for Annie's murder. Finally, Annie's purported drug dealing does not explain the statements in Stephens's letters to his wife.

Stephens argues the trial court erred in not "entertaining the testimonial evidence, proffered by the defense." First, nothing prevented defense counsel from questioning those witnesses and making an offer of proof that their testimony would establish the CI had potentially exculpatory evidence. (Cf. § 354 [no verdict or finding shall be set aside by reason of erroneous exclusion of evidence unless substance, purpose, and relevance of the excluded evidence was made known to court by questions asked or offer of proof].) Second, section 1042, subdivision (d), imposes a duty on the court to question witnesses in camera only where the defendant made "a prima facie showing for disclosure." (*Oppel, supra*, 222 Cal.App.3d at p. 1152.) Where "defendants' offer of proof was inadequate to establish a prima facie case for disclosure . . . , there simply was no need for the magistrate to conduct an in camera hearing in the first instance. Evidence Code section 1042, subdivision (d) does not require such a hearing if an informant is not shown to be in a position to give possible testimony which will aid the defendant on the issue of guilt. The mere assertion that the informant is a material witness on that issue, without any plausible support therefore, does not trigger the requirements of the statute." (*People v. Fried* (1989) 214 Cal.App.3d 1309, 1314-1315.) Thus, the trial court did not abuse its discretion in declining to conduct an in camera hearing to question the defense witnesses. Because the court properly applied the rules of evidence, Stephens did not suffer any due process violation. (See *Cunningham, supra*, 25 Cal.4th at p. 998 [proper application of the rules of evidence ordinarily does not violate due process].)

Nor did the trial court abuse its discretion in denying the renewed disclosure motion. When viewed in conjunction with all of the evidence, the new evidence that Annie had money problems and deposited large amounts of money did not suggest Annie was a drug dealer. Moreover, for the reasons stated earlier, it was not reasonably possible the CI could provide exculpatory evidence. The CI was not a

percipient witness and was not involved in Annie's purported drug dealing, and Annie's drug dealing does not provide an innocent explanation for the presence of Stephens's blood in Annie's bedroom or his letters to his wife.

Finally, Stephens argues the trial court lacked fundamental jurisdiction to rule on the renewed motion to disclose the CI and was required to send the motion to the original judge. Stephens's contention that only the original judge has jurisdiction to consider the renewed motion draws on case law that "the power of one judge to vacate an order made by another judge is limited," (*In re Alberto* (2002) 102 Cal.App.4th 421, 426-427 (*Alberto*)), and that a renewed motion must be brought before the same judge who heard the original motion (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232). Stephens simply is wrong in claiming Judge Conley lacked fundamental jurisdiction to hear Stephens's renewed motion to disclose the CI. A court lacking fundamental jurisdiction has no power to hear a case because it lacks authority over the subject matter of the parties. (*Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 481.) The rule that one superior court judge may not nullify a ruling of another superior court judge is based not on jurisdictional grounds but on "policy considerations" that are "designed to ensure the orderly administration of justice. (*Alberto, supra*, 102 Cal.App.4th at p. 427.) Thus, although "the power of the judge to vacate an order made by another judge is limited," (*ibid.*), it nevertheless exists. We also note Judge Conley did not vacate Judge Steiner's order denying the original disclosure motion.

Stephens's reliance on dicta in *Ziller* is misplaced. (See *Deauville Restaurant, Inc. v. Superior Court* (2001) 90 Cal.App.4th 843, 851 [*Ziller's* statement that a renewed motion must be brought before the same judge who decided original motion is nonbinding dicta].) *Ziller* interpreted section 1008, subdivision (a), of the Code of Civil Procedure, which provides that "[w]hen an application for an order has been made to a judge, or to a court and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, . . . based upon new or

different facts, circumstances, or law, make application to the *same judge or court* that made the order, to reconsider the matter and modify, amend, or revoke the prior order.” (Italics added.) The renewed disclosure motion here was not brought pursuant to Code of Civil Procedure section 1008.

In any event, to the extent Stephens argues that Judge Conley lacked authority rather than fundamental jurisdiction, any conceivable error is attributable to defense counsel. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1250 [“doctrine of invited error applies when a defendant, for tactical reasons, makes a request acceded to by the trial court and claims on appeal that the court erred in granting the request”].) Defense counsel brought the renewed disclosure motion before Judge Conley, and expressly stated, “the argument that we are presenting before this court was not previously heard or considered by Judge Steiner, and so we believe that this court would have the authority to hear this motion at this time.” Defense counsel sought to have the matter sent back to Judge Steiner only after receiving an adverse ruling from Judge Conley. On this record, we decline to entertain Stephens’s challenges to the trial court’s ruling on the renewed disclosure motion.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.